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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-293

WAYNE GOHAM,

Petitioner,

VS.

STATE OF NEBRASKA,

Respondent.

BRIEF OF NATIVE AMERICAN RIGHTS FUND AS AMICUS CURIAE IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

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INTEREST OF *AMICUS CURIAE*

Petitioner and respondent have consented in writing to the filing of this brief. Copies of their consents have been forwarded to the Clerk of the Court. *Amicus* has a considerable interest in the outcome of the case and is particularly qualified in the specialized area of Indian law.

Native American Rights Fund is a non-profit corporation incorporated in the District of Columbia which provides legal representation and counsel to Indians and Indian tribes throughout the country in cases of major significance. The Fund is supported primarily by private grants and

contributions. It participates as *amicus curiae* in this case because of the broad importance to the development of Indian law and the impact which the decision will have on many of its clients.

The question generally of the terms upon which a retrocession of state jurisdiction over Indians can or must be made is relevant to the situation of Indians in all states where Public Law 280 applies. Resolution of the specific question of whether the state or the federal government has jurisdiction over crimes committed on the Omaha Indian Reservation in Nebraska is of vital importance to the persons residing there.

STATEMENT OF THE CASE

In 1953, Congress passed the Act of August 15, 1953, Public Law No. 83-280, 67 Stat. 588 (Public Law 280), providing that states could assume jurisdiction over offenses committed by or against Indians in Indian country without consulting concerned tribes. The statute, as it pertains to criminal offenses, is codified at 18 U.S.C. §1162.

Congress was aware that in certain instances neither the Indians affected, nor the states, were satisfied with jurisdiction as it existed under Public Law 280. Therefore, Congress resolved to allow these states to retrocede to the United States jurisdiction which had been assumed pursuant to Public Law 280. 25 U.S.C. §1323(a).

On April 16, 1969, the State of Nebraska retroceded its jurisdiction over Indian country in Thurston County, Nebraska, to the United States pursuant to 25 U.S.C. §1323(a).

The Secretary of the Interior, under authority delegated to him by the President, had the responsibility of accepting or rejecting the retrocession. He consulted with the two

tribes concerned, Winnebago and Omaha, and found that the Winnebago Tribe, based upon its own peculiar circumstances, did not favor retrocession while the Omahas did. Acting on these expressions of preference by the tribes, the Secretary accepted retrocession only as to the Omaha Indian Reservation by publication of a notice in the Federal Register making the retrocession effective October 25, 1970.[1]

The Nebraska Legislature, on February 1, 1971, attempted to withdraw its offer of retrocession on the ground that the United States did not accept jurisdiction on the exact terms offered. Taking its cue from the Legislature's application of contract law to the situation, the Nebraska Supreme Court determined on May 28, 1971, that the acceptance of retrocession by the Secretary of the Interior over seven months before was not effective because the Secretary's acceptance varied from the terms of the offer. Accordingly, the Nebraska Supreme Court determined that it did have jurisdiction over Petitioner Wayne Goham and affirmed his conviction for a crime committed on the Omaha Indian Reservation.

REASONS FOR GRANTING THE WRIT

The actions by the State of Nebraska raise serious questions about the intent of Congress under 25 U.S.C. §1323(a), including the scope of the Secretary's discretion under that statute. The present jurisdictional status of the Omaha Indian Reservation is in a state of disruption and law enforcement is in jeopardy.

1. **Congress' intent to give Indian tribes a voice in the determination of jurisdiction over their lands, and to vest**

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[1]This was done under authority of Executive Order No. 11435, November 21, 1968, delegating to the Secretary the authority to accept retrocessions of jurisdiction by publication in the Federal Register.

the Executive with discretion over acceptances of retrocession of state jurisdiction is frustrated by the decision below.

A weakness of Public Law 280 was its failure to make cession of jurisdiction dependent upon the will of the Indians affected by it. When Congress enacted the 1968 Civil Rights Act, Act of April 11, 1968, Public Law No. 90-284, 82 Stat. 79, the intent was to vest in Indian tribes some control over whether state or federal authorities should have jurisdiction over their lands. Section 7 of Public Law 280 gave blanket consent of the United States to the assumption of jurisdiction by the legislatures of states not named in the act itself. This section was specifically repealed by the Civil Rights Act of 1968 (25 U.S.C. §1323(b)), and Congress made it clear that state jurisdiction could only be acquired over Indians where the Indians to be affected by it consent. 25 U.S.C. §1322.

In his message to Congress, March 6, 1968, the President said of the proposed change in the law:

> Fairness and basic democratic principles require that Indians on the affected lands have a voice in deciding whether a State will assume legal jurisdiction on their land. I urge Congress to enact legislation that would provide for tribal consent before such extensions of jurisdiction take place.

Hearings on S. 1843 *Before a Subcomm. of the House Comm. on the Judiciary,* 90th Cong., 2d Sess. at 131 (1968).

There is no doubt that Congress was adamant in its intention to be certain that the Indians affected by a change in jurisdiction consent to it.[2] The 1968 Act specifies re-

[2] "Mr. Chairman, I know of no Indian tribe in this country which does not support the amendment to P. L. 280 . . . . [T]his provision [would] assure the tribes of a voice in the determination of whether they would be regulated by state law or

quirements for a special election for this purpose. 25 U.S.C. §1326.

This Court dealt with the question of tribal consent to state jurisdiction under the 1968 Act only a few months ago. *Kennerly v. District Court,* 400 U.S. 423 (1971). While disagreeing on the procedure for obtaining it, both the per curiam and dissenting opinions were in agreement that tribal consent is of critical importance.

It is inconceivable that Congress intended common law contract principles to be used to ascertain whether the Secretary of the Interior properly accepted retrocession by the State of Nebraska. Moreover, Congress did not intend that Nebraska should be able to impose conditions and restrictions on the Secretary which effectively strip him of discretion necessary to the proper performance of his office. Just as Congress intended that Nebraska have broad discretion to determine the nature and extent of the jurisdiction it would retrocede, Congress also intended that the Secretary have broad discretion to determine when and to what extent the United States would be prepared to accept retrocession.

Where the needs and circumstances indicate it is appropriate, Congress intended by its language in §1323(a) concerning retrocession of "all or any measure" of jurisdiction to allow for piecemeal assumption or cession of jurisdiction.[3]

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federal law . . . ." 114 Cong. Rec. 9111, 90th Cong., 2d Sess., April 4, 1968 (remarks of Congressman Ben Reifel).

Senator McGovern testified at hearings on the predecessor to the 1968 Act that he supported it "as an extension of a great principle of democratic government—that the leaders must obtain the consent of those governed." Hearings on S. 966 *Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary,* 89th Cong., 1st Sess. at 16 (1965).

[3]Based upon hearings stressing the value of consultation and consent of Indians affected by a shift in jurisdiction, Senator Ervin modified the predecessor to 25 U.S.C. § 1323(a) (S. 966, 89th Cong., 1st Sess., § 3(a) (1965)) to allow for piecemeal retrocession in order to adjust the administration of justice to reflect the desires of those affected. S. 1843, 90th Cong., 2d Sess., § 303(a) (1968).

This is in contrast to an "all or nothing" choice between blanket state jurisdiction in Indian country or none at all which the Nebraska Supreme Court would impose upon the federal government. Cf. *Kennerly v. District Court, supra* at n. 6.

The requirement that the Secretary have discretion to act is particularly compelling in light of his affirmative duty as a *fiduciary* to act in the best interests of the Indian tribe and to protect and foster the interest of tribal self-government and Indian self-determination. *Williams v. Lee,* 358 U.S. 217 (1959); *Seminole Nation v. United States,* 316 U.S. 286 (1941). The United States has an obligation to safeguard the valid interests of Indian tribes. *Seminole Nation v. United States, supra; Menominee Tribe v. United States,* 101 Ct. Cls. 10 (1944).

If the Secretary cannot take into account the views of the Indians who are affected when making decisions concerning jurisdiction over Indian lands, he has no discretion at all.[4]

By interpolating contract principles into 25 U.S.C. §1323(a), the court below has attempted to deny the Executive even the most basic authority — the ability to take into account the will of Indian tribes in accepting or rejecting retrocessions of jurisdiction. Not only does it require a perversion of the intent of Congress to construe the statute in this rigid manner, it ignores the often repeated principle that in construing statutes affecting Indians, any doubts should be resolved in favor of the Indians. *E.g., Alaska*

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[4]Congress was fully aware of the fact that the Secretary of the Interior was inclined to seek consent of the Indians affected before any retrocession took place. "We believe also that both the tribe and the Federal Government should consent to any retrocession of jurisdiction . . . ." Letter from Frank J. Barry, Acting Secretary of the Interior, to Senator Eastland, Hearings on S. 966, *supra* at 321 (1965).

Pacific Fisheries v. United States, 248 U.S. 78 (1918); *United States v. Celestine*, 215 U.S. 278 (1909).

2. **Review by this court is needed to resolve the jurisdictional chaos on the Omaha Indian Reservation.**

The decision of the Nebraska Supreme Court confuses the present jurisdictional status of the Omaha Indian Reservation to the detriment of its residents. This court is the appropriate forum to unravel the confusion and ascertain whether the State of Nebraska or the United States has jurisdiction over offenses committed by or against Indians on the Omaha Indian Reservation.

CONCLUSION

The thirty-five years which petitioner Wayne Goham will spend in prison may be multiplied by many other questionable convictions of Indians under state law in Nebraska. At the same time, because Indians on the Omaha Indian Reservation question the state's jurisdiction there, they are being denied the full and effective protection of an impartial law enforcement agency.

This situation can repeat itself as often as the Secretary of the Interior accepts retrocessions of state jurisdiction for any less than the full extent tendered by a state. Unless the Secretary has discretion to refuse jurisdiction to the extent that the affected Indians oppose it, based on their own circumstances, he will be unable to carry out the intent of Congress and his duty as a fiduciary to the Indians. That Indians should have a meaningful voice in the determination of jurisdiction over them was written into the law. It is fair to say that it was a prime motive for enacting Public Law 90-284 in 1968.

Respectfully submitted,

Native American Rights Fund

By David H. Getches

Counsel for *Amicus Curiae*

BRIEF FOR RESPONDENTS IN OPPOSITION

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WAYNE GOHAM and DENNIS TYNDALL,
Petitioners,

vs.

STATE OF NEBRASKA,
Respondent.

—o—

On Petition for a Writ of Certiorari to the Supreme Court of Nebraska

—o—

BRIEF FOR RESPONDENT IN OPPOSITION

—o—

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OPINIONS BELOW

The opinions of the Supreme Court of Nebraska in *State v. Goham*, 187 Neb. 35, 187 N. W. 2d 305, and *State v. Tyndall*, 187 Neb. 48, 187 N. W. 2d 298, are appended to the petition filed herein.

—o—

JURISDICTION

The jurisdictional requisites are set forth in the petition.

———o———

QUESTIONS PRESENTED

1. Whether the action of the Secretary of the Interior in purporting to accept a different measure of retrocession of criminal jurisdiction over Indians in Thurston County than that offered by the Nebraska Legislature constituted a valid acceptance, as contemplated by 25 U. S. C. A. § 1323?

2. If the attempted acceptance of a measure of retrocession was valid, whether the retrocession operated to divest the Nebraska Courts of jurisdiction over pending cases?

3. Whether this case is a proper one for this Court to decide the validity and effect of the purported retrocession?

———o———

RESOLUTIONS, STATUTES AND REGULATIONS INVOLVED

In addition to the material contained in this section of the petition, we also call the Court's attention to Section 49-301, R. R. S. 1943, which provides:

> "Whenever a statute shall be repealed, such repeal shall in no manner affect pending actions founded thereon, nor causes of action not in suit that accrued

prior to any such repeal, except as may be provided in such repealing statute."

Article IV, Section 15 of the Nebraska Constitution provides in part:

> "Every bill passed by the Legislature, before it becomes a law, and every order, resolution or vote to which the concurrence of both Houses may be necessary (except on questions of adjournment) shall be presented to the Governor. If he approves he shall sign it, and thereupon it shall become a law, but if he do not approve, he shall return it with his objections to the House in which it shall have originated, which House shall enter the objections at large upon its journal, and proceed to reconsider the bill. If then three-fifths of the members elected agree to pass the same, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered; and if approved by three-fifths of the members elected to that House, it shall become a law, notwithstanding the objections of the Governor. * * *."

———o———

STATEMENT OF THE CASE

Respondent in general accepts petitioners' statement of the case but points out that the conclusion of the Nebraska Supreme Court that retrocession had not taken place was based upon its decision that the offer of retrocession had not been validly accepted, and therefore Nebraska had never lost jurisdiction. The withdrawal of the offer of retrocession operated only to prevent a later acceptance, and the Court did not treat it as operating to regain jurisdiction temporarily lost. The withdrawal of

the offer of retrocession therefore has no direct bearing on the case, except that it shows what the intention of the Legislature was in making the offer.

———o———

ARGUMENT

I.

Effect of Partial Acceptance

18 U. S. C. A. § 1162, adopted in 1953, gave Nebraska exclusive criminal jurisdiction over all Indian country within the state. 25 U. S. C. A. § 1323, adopted in 1968, authorized the United States to accept a retrocession by any state of all or any measure of the criminal or civil jurisdiction, or both, acquired by such state pursuant to Section 1162 of Title 18. The 1968 Act clearly contemplates an offer of retrocession by the state, and an acceptance of the offer by the United States. The applicability to this situation of contract law is immediately apparent. The decision to offer retrocession in the first instance is solely that of the state. Many factors go into that decision, including the safety of citizens of the state, the maintenance of law and order, and the expenses involved.

The 1968 Act specifically provides for retrocession of less than all of the jurisdiction acquired by the 1953 Act. We believe, as did the Nebraska Supreme Court, that the language of the 1968 Act contemplated that the decision as to the extent of the retrocession was to be made by the state, and the United States then had the

option to accept or reject the proffered retrocession. Petitioners, on the other hand, take the position that the United States can, without the consent of the state, accept so much of the offered retrocession as it cares to, and refuse the balance.

We will not become engaged in a long argument involving sentence structure in analyzing the 1968 Act, although we believe the sentence, from a purely grammatical standpoint, indicates that the United States has the right to accept the offer, but that the offer should designate the measure of the retrocession. In any event, wholly aside from the question of sentence structure, it is obvious that, in order to intelligently decide whether to make an offer of retrocession, the Legislature *must* have the right to decide the extent thereof. As we pointed out above, many considerations go into a decisicn to retrocede jurisdiction. One of the big considerations, of course, is cost. A partial retention of jurisdiction may cost as much as complete retention, and be much more chaotic and confusing. Yet, petitioners would say that the state has no control over the situation, and once it makes an offer, the United States can make a partial acceptance, and leave the state in an undesirable, or even intolerable situation. In *State v. Goham*, the Nebraska Supreme Court said that the difficulties in attempting to exercise jurisdiction in only a part of the Indian territory in the county was so patent as not to need elaboration.

The Nebraska Supreme Court has construed the resolution of retrocession as not being an offer of partial retrocession, and the Legislature, in its 1971 resolution, specifically said that the acceptance was not in accordance

with the terms and provisions of the original resolution. So far as a construction of the meaning of the 1969 resolution is concerned, the decision of the Nebraska Supreme Court should be binding.

II.

Effect of Retrocession on Pending Cases

Since the Nebraska Supreme Court held that retrocession had never become effective, it did not reach the question of whether retrocession would operate to divest the Nebraska Courts of jurisdiction over cases pending at the time of acceptance. However, in order to grant petitioners any relief, this Court would have to reach this question and reach a truly monstrous result. We say this because a decision by this Court that Nebraska lost jurisdiction of pending cases would, without question, result in complete immunity to the petitioners.

We believe it is well settled that 18 U. S. C. A. § 1162, gave the State of Nebraska exclusive criminal jurisdiction over Indian country in this state. See, *Anderson v. Gladden*, 293 F. 2d 463 (9th Circuit, 1961). At the time the crimes of which petitioners were convicted were committed, no federal statute covered these crimes at that place. The Assimilative Crimes Act, 18 U. S. C. A. § 13, is not applicable, because it applies only to places under the exclusive or concurrent jurisdiction of the United States, and this was under the exclusive jurisdiction of Nebraska.

There having been no federal statute applicable to these crimes at the place and time they were committed,

any construction of the federal act or the Nebraska resolution, the effect of which would be to confer jurisdiction on the Federal Courts, or to make federal statutes applicable, would be patently ex post facto. Petitioners could therefore never be prosecuted for these crimes anywhere. Yet this is the result inherent in petitioners' claim of loss of jurisdiction over pending cases, and loss of jurisdiction over pending cases is vital to petitioners' case. Otherwise, the question of retrocession is entirely moot, so far as petitioners are concerned.

Petitioners cite some cases involving civil actions, in which jurisdiction has been taken away from one tribunal and given to another. These cases are not at all in point, because in civil cases, jurisdiction *can* be given to another tribunal, or even to another sovereignty. Here there is no question of taking jurisdiction from Nebraska Courts and giving it to the Federal Courts. It is simply a question of taking jurisdiction from the only Court which could exercise it, and granting complete immunity to the criminals, no matter how heinous the crime. We submit that, as a matter of legislative construction, such a result should be reached only where the legislative intent is clear and unequivocal.

Furthermore, the construction of the intent of the Legislature in passing the retrocession resolution should be for the Nebraska Supreme Court, not this Court. Also, Nebraska statutes should be considered in establishing the intent. While not strictly applicable, Section 49-301, R. R. S. 1943, is indicative of Nebraska's attitude with respect to the effect of legislation on pending actions. It provides:

"Whenever a statute shall be repealed, such repeal shall in no manner affect pending actions founded thereon, nor causes of action not in suit that accrued prior to any such repeal, except as may be provided in such repealing statute."

III.

Is This Case the Proper One for This Court to Decide the Issues Involved?

The Federal Courts, and perhaps ultimately this Court, will decide the effect of the attempt of the Secretary of the Interior to partially accept retrocession, and also, if the acceptance was effective, its effect upon pending cases. We submit, however, that the record in the Court below is not such that this Court should grant certiorari at this time.

As petitioners have pointed out in their petition, the Omaha Tribe of Nebraska has filed suit in the United States District Court for the District of Nebraska seeking a determination of the effect of the Secretary of the Interior's attempted acceptance. Furthermore, the petitioners herein, together with two other Omaha Indians, have filed an action in the United States District Court, seeking a declaratory judgment that the Nebraska Courts have no further jurisdiction over pending criminal complaints against them, and for an injunction against further prosecution.

In these cases pending in the United States District Court, an additional fact has come to light which was not known at the time of the *Goham* and *Tyndall* decisions in the Nebraska Supreme Court, and was therefore not considered by that Court. Article IV, Section 15 of the

Nebraska Constitution requires bills and resolutions passed by the Legislature to be presented to the Governor for his approval or veto. If he vetoes it, it may be passed over his veto by a three-fifths vote. Neither the retrocession resolution nor the resolution withdrawing retrocession was presented to the Governor for his approval. The Nebraska Supreme Court has held in *In Re Contest Proceedings*, 31 Neb. 262, 47 N. W. 923, that a resolution not presented to the Governor for his approval was invalid, under the above constitutional provision.

The State of Nebraska is therefore taking the position in both of the cases now pending in the United States District Court that the original retrocession resolution was void, under Nebraska law, because it was not presented to the Governor. That issue should be decided before this Court considers the matter. To grant certiorari now, in this case, and resolve the issues favorably to the petitioners, could only create chaos if the lower courts later decide the retrocession resolution was not valid in the first place.

———o———

CONCLUSION

We submit that the Nebraska Supreme Court's decision was correct in holding that the offer of retrocession was never validly accepted by the United States. If we are incorrect in this, the petitioners are still entitled to no relief unless the retrocession can be construed as divesting the Nebraska Court of jurisdiction over pending cases,

which issue has not been considered by the Nebraska Supreme Court. These issues, as well as the issue of the effect of the failure to present the resolution to the Governor, are now being considered by the United States District Court. It would be most inappropriate for this Court to grant certiorari at this time.

Respectfully submitted,

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